Mesra Associates Sdn Bhd v Goh Choon Aun & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-611 OF 1999
KAMALANATHAN RATNAM J
5 MAY 2003

Civil Procedure *— Costs — Security for costs — Whether plaintiff ought to provide security for costs — Test for whether plaintiff ought to provide security for costs — Plaintiff alleging that its financial problem occasioned by non-receipt of payments from defendants — Whether plaintiff could rely on such allegations — Whether claim for security for costs an attempt to stifle claim — Companies Act 1965 s 351(1)*

The plaintiff was at all material times a firm of consulting mechanical and electrical engineers employed by the defendants. The first defendant was at all material times a director common to the second to the sixth defendants who were the owners and developers of the building projects in respect of which the plaintiff was engaged. This was an application (encl 34) by all the defendants for an order that the plaintiff provide security for costs for each of the defendants and that all proceedings be suspended until such time as such security for costs be paid, and if not paid within three months from the date of the order, then for an order that the said suit be deemed dismissed with costs. The defendants filed three affidavits amongst them, to show by 'credible testimony' that there is reason to believe that the plaintiff will be unable to pay the costs of the defendants if they are successful. The defendants exhibited the accounts of the plaintiff for the years 1997, 1998 and 1999 and this showed that the plaintiff had been sustaining losses for the three years consecutively. However the accounts for the year ending 2000 showed a net profit after taxation, although a small sum. Whilst the plaintiff admitted that it had financial problem, it averred that its financial problem has been occasioned by the non-receipt of payments due from the defendants. The defendants relied on *Strukturmas (Selangor) Sdn Bhd v Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344 in which the same court held that it was not proper for a plaintiff to contend that its losses were occasioned as a result of the defendants' action. The application for security for costs was heard and dismissed by the registrar. The defendants appealed.

Held, dismissing the appeal:

(1) The facts of the present case were different from the situation in *Strukturmas*. The plaintiff in this case filed its statement of accounts for all the years and was carrying on its business. It had a very substantial claim against the defendants. The defendants had made no attempt to strike out the plaintiff's claim which gave the impression that the plaintiff has a legitimate cause of action. Indeed the second defendant had even made a counter-claim and the plaintiff has filed a reply to the defence of all the defendants and a defence to the counter-claim of the second defendant. The second defendant had also filed a request for further and better

particulars (see pp 34H–35A); *Strukturmas (Selangor) Sdn Bhd v Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344 distinguished. A

(2) Section 351(1) of the Companies Act 1965 provides for a two-stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step was for a B determination whether there was credible evidence. The second step was to ascertain whether that evidence, when 'found to be credible' supported the belief that the plaintiff would be unable to pay the costs of a successful defendant (see p 35B–D); *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* [1985] 1 NSWLR 114 and *Skrine & Co v MBF Capital Bhd & Anor* C [1998] 3 MLJ 649 followed.

(3) The use of the word 'credible' suggests a requirement that the evidence to be relied upon has some characteristic of cogency. Qualification of the word testimony by the word 'credible' suggests that an evidentiary burden is undertaken by the party D seeking the order. It amounts to an obligation on an applicant for an order to show that the material before the court is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the plaintiff would be unable to pay the costs of that party upon disposal of the proceedings. Mere speculation as to insolvency or financial difficulties likely to confront the plaintiff E would be insufficient to ground the exercise of the discretion. In the circumstances the court was not at all convinced that the defendants had satisfied the court in respect of the first test (see pp 35H–36A).

(4) An application for security may be dismissed if the plaintiff F company shows, whether expressly or impliedly, that there is a probability that it would be unable to pursue the action if the order was granted. Having read the affidavits and the pleadings, the court was satisfied that the plaintiff had shown that it had a bona-fide claim against the defendants with a reasonable prospect of success (see pp 36G–37A); *Trident International Freight Services* G *Ltd v Manchester Ship Canal Co &Anor* [1990] BCLG 263 followed.

(5) There was substance in the plaintiff's claim by the very fact that the first defendant had offered a condominium as a set off. The plaintiff had averred that the first defendant had offered to H transfer a condominium worth RM270,000 to the plaintiff. The fact that the condominium was offered to contra was contained in the plaintiff's letter and has not been replied to nor denied by the defendants. Thus this application for security for costs was an attempt to stifle a genuine claim and it was possible that the plaintiff's position has been brought about by the conduct of the I defendant in causing such delay in payment (see pp 35G, 36F–G).

A **[Bahasa Malaysia summary**

Plaintif pada setiap masa material adalah sebuah firma jurutera perunding mekanikal dan elektrik yang dilantik oleh defendan-defendan. Defendan pertama pada setiap masa material seorang pengarah syarikat defendan-defendan kedua hingga keenam yang B masing-masing menjadi tuan punya serta pemaju projek pembangunan di mana plaintif telah dilantik. Ini merupakan permohonan (lampiran 34) oleh kesemua defendan bagi suatu perintah supaya plaintif memberikan sekuriti bagi kos setiap defendan dan supaya kesemua prosiding digantungkan sehingga sekuriti bagi C kos dibayar dan, sekiranya tidak dibayar dalam masa tiga bulan dari tarikh perintah, supaya suatu perintah bahawa tindakan ini dianggap sebagai ditolak dengan kos. Defendan-defendan telah mengemukakan tiga afidavit antara mereka, bagi menunjukkan melalui 'credible testimony' bahawa wujud sebab-sebab menyakini plaintif tidak akan berupaya membayar kos defendan-defendan sekiranya mereka D berjaya. Defendan-defendan melampirkan akaun plaintif bagi tahun-tahun 1997, 1998 and 1999 dan ini menunjukkan bahawa plaintif telah mengalami kerugian bagi tiga tahun ini berturut-turut. Walau bagaimanapun akaun bagi tahun berakhir 2000 menunjukkan untung bersih selepas cukai, walau pun jumlahnya kecil. Walaupun plaintif mengaku ia menghadapi masalah kewangan, ia mendakwa masalah E kewangannya disebabkan ketidakterimaan bayaran yang perlu dibayar oleh defendan-defendan. Defendan-defendan telah mengemukakan kes *Strukturmas (Selangor) Sdn Bhd v Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344 dimana mahkamah ini telah mendapati adalah tidak wajar seseorang plaintif mendakwa kerugian yang dialaminya F adalah akibat tindakan defendan. Permohonan sekuriti bagi kos didengar dan ditolak oleh pendaftar. Defendan-defendan telah merayu.

Diputuskan, menolak rayuan tersebut:

G (1) Fakta-fakta dalam kes ini adalah berbeza dari situasi dalam *Strukturmas*. Plaintif dalam kes ini telah memfailkan penyata akaunnya bagi setiap tahun dan masih menjalankan perniagaan. Ia mempunyai suatu tuntutan yang besar ke atas defendan-defendan. Defendan-defendan tidak mengambil sebarang H tindakan menyangkal tuntutan plaintif yang memberi pandangan bahawa plaintif mempunyai suatu kausa tindakan yang benar. Malah defendan kedua telah pun membuat suatu tuntutan balas dan plaintif telah memfailkan jawapannya kepada pembelaan kesemua defendan-defendan serta pembelaannya kepada tuntutan balas defendan kedua. Defendan kedua telah pun I membuat permohonan butir-butir lanjut dan jelas (lihat ms 34H–35A); *Strukturmas (Selangor) Sdn Bhd lwn Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344 dibeza.

(2) Seksyen 351(1) Akta Syarikat 1965 memperuntukkan suatu soal-siasat dua langkah dalam proses mencapai pendapat sama ada sekuriti bagi kos patut ditawarkan dalam sesuatu kes di mana plaintif sebuah syarikat. Langkah pertama adalah supaya mengenalpasti sama ada wujudnya keterangan yang dapat dipercayai. Langkah kedua adalah supaya mengenalpasti sama ada keterangan, apabila 'didapati meyakinkan' itu menegakkan kepercayaan bahawa plaintif tidak akan berupaya membayar kos seseorang successful defendan yang berjaya (lihat ms 35B–D); *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* [1985] 1 NSWLR 114 dan *Skrine & Co v MBF Capital Bhd & Anor* [1998] 3 MLJ 649 diikut.

(3) Penggunaan perkataan 'credible' mencadangkan suatu keperluan supaya keterangan yang diberikan itu perlu membawa ciri-ciri bahawa ia dapat dipercayai. Penghadan perkataan keterangan dengan perkataan 'credible' menyaran supaya beban keterangan ditanggung oleh pihak yang menuntut perintah tersebut. Ia seolah-olah obligasi ke atas pemohon perintah menunjukkan bahawa bahan-bahan yang dihadapkan mahkamah adalah cukup meyakinkan bagi membenarkan kepercayaan yang rasional wujud bahawa, sekiranya diperintahkan berbuat demikian, plaintif tidak akan berupaya menanggung kos pihak tersebut pada penyelesaian prosiding. Spekulasi semata-mata ke atas ketaksolvenan atau kesusahan kewangan yang mungkin dihadapi plaintif adalah tidak mencukupi sebagai alasan menjalankan kuasa budi bicaranya. Dalam keadaan ini mahkamah tidak yakin langsung defendan-defendan telah menunaikan tahap bukti langkah pertama kepada mahkamah (lihat ms 35H–36A).

(4) Suatu permohonan bagi sekuriti dapat ditolak sekiranya plaintif syarikat menunjukkan, sama ada express atau dengan membawa implikasi, kemungkinan plaintif tidak meneruskan tindakan tersebut sekiranya perintah diberikan. Setelah membaca afidavit-afidavit serta pliding-pliding, mahkamah berpuas hati bahawa plaintif telah menunjukkan bahawa ia mempunyai suatu tuntutan yang bona fide terhadap defendan-defendan dengan prospek kejayaan yang munasabah (lihat ms 36G–37A); *Trident International Freight Services Ltd v Manchester Ship Canal Co & Anor* [1990] BCLG 263 diikut.

(5) Wujudnya kebenaran dalam tuntutan plaintif walaupun semata-mata dari tindakan defendan pertama menawarkan sebuah kondominium sebagai tolakan. Plaintif menuduh defendan pertama telah menawarkan pemindahan milik sebuah kondominium bernilai RM270,000 kepadanya. Tawaran kondominium tersebut sebagai kontra terkandung dalam surat plaintif dan fakta ini tidak pernah dijawab atau dinafikan oleh defendan-defendan. Maka permohonan bagi sekuriti ini adalah suatu percubaan membendung suatu tuntutan benar dan

kemungkinan kedudukan plaintif adalah akibat tindakan defendan melengah-lengahkan pembayaran (lihat ms 35G, 36F–G).]

Notes

For cases on security for costs, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1741–1787.

Cases referred to

MBF Capital Bhd & Anor v Tommy Thomas & Anor [1998] MLJU 229; [1999] 5 CLJ 131 (refd)

Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273 (refd)

Skrine & Co v MBF Capital Bhd & Anor [1998] 3 MLJ 649 (folld)

Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd [1985] 1 NSWLR 114 (folld)

Strukturmas (Selangor) Sdn Bhd v Majlis Perbandaran Petaling Jaya [2001] 3 MLJ 344 (distd)

Trident International Freight Services Ltd v Manchester Ship Canal Co & Anor [1990] BCLG 263 (folld)

Warren Mitchell Pty Ltd v Australian Maritime Officers' Union & Ors [1993–94] 12 ACSR 1 (refd)

Legislation referred to

Companies Act 1965 s 351(1)

Companies Act 1948 [UK] s 447

Rusmin Alwani bte Shukery (*Shahrizat & Tan*) for the appellant/defendants.

Devano Hasbi (*Tan Kim Soon & Co*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

Facts

This is an application (encl 34) by all the defendants for an order that the plaintiff do provide security for costs amounting, to RM302,495.01 for the first defendant, RM169,247.51 for the second defendant, RM10,767.86 for the third defendant, RM21,000 for the fourth defendant, RM47,886.50 for the fifth defendant and RM53,592.15 for or the sixth defendant or such sums as the court deems just and fair, and that all proceedings be suspended until such time as such security for costs as is ordered to be paid is paid, and if not paid within three months from the date of the order, then for an order that the said suit be deemed dismissed with costs. The defendants also prayed for the costs of this application.

Enclosure 34 was heard and dismissed by the learned senior assistant registrar. This is the defendants' appeal against the said dismissal.

Findings of the court

This application by the defendants is made pursuant to s 351(1) of the Companies Act 1965 ('the Act') which reads as follows:

> Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

The defendants filed three affidavits amongst them, to show by 'credible testimony' that there is reason to believe that the plaintiff will be unable to pay the costs of the defendants if they are successful. The defendants exhibited the accounts of the plaintiff for the years 1997, 1998 and 1999 and this showed that the plaintiff had been sustaining losses for the three years consecutively. However, the accounts for the year ending 2000 showed a net profit after taxation, although a small sum. Whilst the plaintiff admits in its affidavit (encl 40) that it has financial problem, it attributes this to the non-payment of its contracted sums by the defendants. The plaintiff was at all material times the consulting mechanical and electrical engineers employed by the defendants. The first defendant was at all material times a director common to the second to the sixth defendants who were the owners and developers of the building projects in respect of which the plaintiff was engaged. The plaintiff has pleaded an elaborate statement of claim against all the defendants and has averred that its financial problem has been occasioned by the non-receipt of payments due from the defendants.

The defendants relied on *Strukturmas (Selangor) Sdn Bhd v Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344, a case, decided by me in which I had held that it was not proper for a plaintiff to contend that its losses were occasioned as a result of the defendants' action. The facts in *Strukturmas* were different. In that case, the action was filed by the plaintiff and left for almost ten years. The defendant's solicitor made a search at the registry of companies eight years after the suit was filed and discovered that the plaintiff's current liabilities far exceeded its current assets. The most significant revelation was that since 1992, the plaintiff had yet to file its annual audited accounts for the subsequent years. The defendant then applied for certain orders pertaining to security for costs against the plaintiff. The defendant's application was heard by the senior assistant registrar and was dismissed with costs. The defendant appealed. I allowed the appeal because I held that since 1992 and for the subsequent eight years the plaintiff had not filed the returns and this f act had not been denied by the plaintiff in its affidavit. if there was any trading there must be returns. It called for the presumption that the plaintiff was a dormant company waiting to inject itself with funds from this case.

The facts of the case before me are different. The plaintiff has filed its statement of accounts for all the years and is carrying on its business. It has a very substantial claim against the defendants. The defendants had made no attempt to strike out the plaintiff's claim which prima facie gives the impression that the plaintiff has a legitimate cause of action. Indeed, the

second defendant has (even made a counterclaim and the plaintiff has filed a reply to the defence of all the defendants and a defence to the counterclaim of the second defendant. The second defendant had also filed a request for further and better particulars.

It is my judgment that this application for security for costs is an abuse of the process of the court and is a clear, attempt to stifle prosecution of the plaintiff's claim.

In *Skrine & Co v MBF Capital Bhd & Anor* [1998] 3 MLJ 649, in addressing its mind to s 351(1) of the Act, the Court of Appeal held at pp 657–658 as follows:

> The section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when 'found to be credible' supports the belief that the company' will be unable to pay the costs of a successful defendant.

This principle was distilled by the Court of Appeal from *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* [1985] 1 NSWLR 114 where at p 134, Waddell J said:

> The first may be described as a threshold question. It is, whether, having regard to the whole of the evidence before the court, there is credible testimony by which it appears that there is reason to believe that the plaintiffs will be unable to pay the costs of the defendants if successful in their defence. If this question is answered, yes, the second question arises which is whether, in the exercise of the discretion given to the court by the subsection, the relief sought should be granted wholly or in part or should be refused.

Applying the first test, I must now see if from the whole of the evidence, there is credible evidence tendered by the defendants as to the plaintiff's impecuniosity. The defendants have merely tendered the plaintiff's statement of accounts for the years 1977 to 1999. However, for the year 2000, the plaintiff has made a slight profit. The plaintiff is trading and is carrying on business. But what is of paramount consideration is the plaintiff's averment that the first defendant had offered to transfer one unit condominium worth RM270,000 to the plaintiff. The fact that there was the condominium to contra as contained in the plaintiff's letter, exh LBK 12 to encl 38, has not been replied to nor denied by the defendants. It is also pertinent to consider the words of Lee J in *Warren Mitchell Pty Ltd v Australian Maritime Officers' Union & Ors* [1993–94] 12 ACSR 1 at p 5:

> The use of the word 'credible' suggests a requirement that evidence to be relied upon has some characteristic of cogency. Qualification of the word testimony by the word 'credible' suggests that an evidentiary burden is undertaken by the party seeking the order. It amounts to an obligation on an applicant for an order to show that the material before the court is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the corporation would be unable to pay the costs of that party upon disposal of the proceedings. To what extent the satisfaction of that standard may fall short

> of the demonstration of a likelihood that the corporation will be insolvent at the relevant time is unnecessary to decide. It is enough to say that speculation as, to insolvency or financial difficulties likely to confront the corporation will be insufficient to ground the exercise of the discretion.

In the circumstances, I am not at all convinced that the defendants have satisfied the court in respect of the first test set out by the Court of Appeal in *Skrine & Co.*

In *MBF Capital Bhd & Anor v Tommy Thomas & Anor* [1998] MLJU 229, [1999] 5 CLJ 131 this is what I said at pp 137–138 of the CLJ after considering s 351(1) of the Act:

> The word credible evidence does not mean evidence tested at the forge of a trial by the fire of cross-examination. It suggests that it is reasonably possible based on the evidential burden of proof resting with the defendants, that the first plaintiff would be unable to pay the costs.

The Court of Appeal in *Skrine & Co* had upheld this judgment.

In *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273, the Court of Appeal held that even where there was credible evidence that a limited company would be unable to pay the costs of a successful debt, their s 447 of the Companies Act 1948, almost similar in context to our s 351(1) of the Act, is not mandatory but gave the court a discretion whether or not to order security for costs against the company where there were special circumstances. In what could be considered special circumstances, Lord Denning MR said at pp 285–286 as follows:

> The court might also consider whether the application for security was being used oppressively so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.

I too have considered these issues, and accepting the judgment in *Sir Lindsay Parkinson & Co Ltd* as authority, I hold that since there is substance in the plaintiff's claim by the very fact that the first defendant had offered a condominium as a set off, this application for security for costs is an attempt to stifle a genuine claim and that as pleaded by the plaintiff, it is possible that the plaintiff's position has been brought about by the conduct of the defendant in causing such delay in payment.

In *Trident International Freight Services Ltd v Manchester Ship Canal Co & Anor* [1990] BCLG 263, the Court of Appeal held that an application for security may be dismissed if the plaintiff company shows, whether expressly or impliedly, that there is a probability that it will be unable to pursue the action if the order is granted. I have long considered this view as being a just one and having read the plaintiff's copious affidavits and the numerous letters exhibited pleading for payments, I am moved to state that it must be a matter for special consideration, that an impecunious party should not be driven from the judgment seat, unless the justice of the case makes it so. Having read all the affidavits and the statement of claim and the defences, I am satisfied that the plaintiff has shown that it has a bona fide claim

against the defendants with a reasonable prospect of success. I therefore dismissed the appeal with costs.

Appeal dismissed.

Reported by Sivapragasam P Kumaran